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ARIZONA SUPREME COURT

In the Matter of: Petition to Amend Ariz. R. Sup. Ct. 32 (A)—(M)	Supreme Court No. R-25-0001 **Comment Opposing Petition to Amend Ariz. R. Sup. Ct. 32(A)—(M)**

Pursuant to Rule 28(e) of the Arizona Supreme Court Rules, the Arizona Attorney General's Office (the "Office") respectfully submits this comment in opposition to the Petition to Amend Rule 32(A)—(M) of the Rules of the Supreme Court of Arizona (the "Petition"). The Petition seeks to eliminate mandatory membership in the State Bar of Arizona, transition regulatory functions to the Arizona Supreme Court through its Administrative Office of the Courts (AOC), and convert the bar into a fully voluntary organization by January 1, 2027. This comment urges the Court to deny the Petition, which relies on a legally unsupported rationale and proposes changes that would be administratively disruptive and contrary to the public interest.

The proposed rule change is premised on the assertion that *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018), undermines the constitutional foundation of mandatory bar associations. However, binding precedent—including *Keller v. State Bar of California*, 496 U.S. 1 (1990)—remains controlling and has been repeatedly affirmed by state and federal courts post-*Janus*. The Petition misreads *Janus*, overlooks the Arizona Bar's compliance with constitutional safeguards, and underestimates the vital regulatory and public service functions the Arizona Bar performs.

In addition to addressing the flawed constitutional claims, this comment highlights the real and foreseeable harms that would result from dismantling the integrated bar. These include financial and administrative burdens on the judiciary, loss of institutional expertise, and the degradation of public-facing programs, such as legal hotlines, pro bono coordination, and client protection initiatives.

I. Binding precedent upholds the constitutionality of the integrated bar.

In *Keller*, the U.S. Supreme Court unanimously affirmed that states may require attorneys to join and pay dues to an integrated bar. *Id*. at 4. The Court held that these requirements justify "the State's interest in regulating the legal profession and improving the quality of legal services," and that state bars may "constitutionally fund activities germane to those goals" using mandatory dues. *Id*. at 13-14.

Petitioners argue that *Janus* "placed *Keller* on shaky constitutional ground." Petition at 8. In *Janus*, the court overruled *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)—a case *Keller* cited—holding that "exacting scrutiny, if not a more demanding standard," generally applies in the Court's First Amendment jurisprudence. *Janus*, 585 U.S. at 925. On this basis, Petitioners claim that *Janus* undermines the constitutional foundation for mandatory bar membership. Petition at 2-3.

Petitioners' argument is misplaced. *Keller* did not rely solely on *Abood*. Rather, it built upon *Lathrop v. Donohue*, 367 U.S. 820 (1961), where the U.S. Supreme Court first upheld the constitutionality of integrated bars and rejected the notion that compelled membership alone violated attorneys' associational rights. In *Lathrop*, the court concluded that inclusion in a regulatory bar does not amount to compelled ideological association, especially where membership does not imply endorsement of the bar's views. 367 U.S. at 843 (plurality op.); *id*. at 859 (Harlan, J., concurring). The Court in *Keller* declined to resolve the broader freedom of association claim. 496 U.S. at 17.

Crucially, nothing in *Janus* disturbs this framework. *Janus* addressed a different issue—whether public-sector employees who are not union members can be compelled to pay agency fees for collective bargaining. It did not involve compelled membership, nor did it discuss *Keller* or *Lathrop*. *See Schell v. Chief*

Just. & Justs. of Oklahoma Supreme Ct., 11 F. 4th 1178, 1191 (10th Cir. 2021) ("*Janus* did not overrule *Keller*'s discussion of *Abood*, or its related discussion of germaneness.").

In the wake of *Janus*, federal courts have continued to acknowledge *Keller*'s precedential weight. In a case cited by petitioners (at 3), for example, the Seventh Circuit held that "[Plaintiff's] claim is squarely foreclosed by the Supreme Court's decision in *Keller*." *File v. Martin*, 33 F. 4th 385, 391 (7th Cir. 2022). And numerous other federal courts have agreed that *Keller* remains good law unless and until the Supreme Court says otherwise. *See, e.g.*, *Pomeroy v. Utah State Bar*, No. 2:21-CV-00219-TC-JCB, 2024 WL 1810229, at *4-6 (D. Utah Apr. 25, 2024) (indicating that *Keller* is still binding precedent); *Crowe v. Oregon State Bar*, 989 F. 3d 714, 724-25 (9th Cir. 2021) (rejecting view that *Janus* must be consulted when analyzing the plaintiff's *Keller* free speech claim); *Taylor v. Buchanan*, 4 F. 4th 406, 408 (6th Cir. 2021) (same); *Schell*, 11 F. 4th at 1191 (10th Cir. 2021) ("To be sure, the Supreme Court may reexamine its precedent on mandatory bar dues, but it did not do so in *Janus*."); *cf. Boudreaux v. Louisiana State Bar Ass'n*, 86 F. 4th 620, 626 (5th Cir. 2023) (applying "heightened first amendment scrutiny" but clarifying that "the constitutionality of mandatory bar associations still turn[s] on 'germaneness'"); *McDonald v. Longley*, 4 F. 4th 229, 243-44 (5th Cir. 2021) (allowing challenge to proceed based on allegations that the Texas Bar engaged in non-germane activities).

Notably, the U.S. Supreme Court has repeatedly declined certiorari in cases inviting it to revisit *Keller* in light of *Janus*. *See, e.g.*, *Jarchow v. State Bar of Wisconsin*, 140 S. Ct. 1720 (2020); *Firth v. McDonald*, 142 S. Ct. 1442 (2022); *Schell v. Darby*, 142 S. Ct. 1440 (2022); and *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021).

There is additional good reason for so many courts to have concluded that *Keller* remains good law post-*Janus* and for the Supreme Court to have declined to review the question—integrated bars are structurally and functionally distinct from public-sector unions. The Arizona Bar does not act as an exclusive representative, does not bargain with the government, and does not speak as the exclusive voice of its members. Attorneys remain free to express their own views, even when they disagree with the bar. As the Court explained in *Harris v. Quinn*, 573 U.S. 616 (2014), while *Abood* may have been flawed, *Keller* "fits comfortably within the framework applied" in that case. *Id*. at 655. The Court further emphasized that states have a legitimate interest in allocating to members of the bar—rather than to the general public—the costs of ensuring ethical and competent legal practice. *Id*. at 656.

Ultimately, as the U.S. Supreme Court has consistently reiterated, it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). *See also Hohn v.*

United States, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). *Keller* and *Lathrop* remain good law, and Petitioners provide no compelling basis for departing from them.

II. The Arizona Bar complies with constitutional requirements.

Petitioners contend that the Arizona Bar violates the First Amendment by failing to adopt *Janus*-style opt-in procedures before using any portion of mandatory dues for non-germane activities. Petition at 3, 12-13. This argument mischaracterizes the holding in *Janus* and its applicability to integrated bar associations. *Janus* involved compelled union dues in the context of public-sector labor and did not address—let alone overrule—the framework governing mandatory bar membership under *Keller*.

In contrast to the opt-in regime discussed in *Janus*, *Keller* and its progeny have long permitted the use of refund-based systems for addressing non-germane expenditures. The Arizona Bar follows this well-established model. Attorneys may request a refund for any portion of their dues used to support activities not germane to attorney regulation or the improvement of legal services. *See* State Bar of Arizona, Keller-Refund-Request Policy and Procedures, https://www.azbar.org/media/8d89c8972189f52/keller-policy-and-procedures-final-bog-approved-09-27-19.pdf (last visited April 7, 2025).

Courts have repeatedly upheld the constitutionality of such refund procedures post-*Janus*. In *Pomeroy*, for example, the court rejected the argument that *Janus* requires opt-in systems for bar dues, concluding that a refund process adequately addressed First Amendment concerns—even where the bar engaged in some non-germane activity. *Id*. at *5–6. Likewise, in *Crowe*, the Ninth Circuit rejected a similar challenge, reaffirming that *Keller* remains binding and that courts need not impose opt-in requirements for bar associations. *Id*. at 725–26.

Petitioners further argue that the Arizona Bar lacks transparency and accountability (Petition at 13) but this claim disregards the significant judicial oversight embedded in Arizona's legal regulatory system. The Arizona Bar operates under the authority of the Arizona Supreme Court, which promulgates the governing rules and retains ultimate responsibility for key functions, including admissions. *See* Ariz. Sup. Ct. R. 33–34, 50–52; *see also* Petition at 15–18 (acknowledging that the Court already performs most attorney regulatory functions). The Arizona Bar publicly discloses its financial information and provides members with an established process for objecting to non-germane spending. *See* State Bar of Arizona, Keller-Refund-Request Policy and Procedures, https://www.azbar.org/media/8d89c8972189f52/keller-policy-and-procedures-final-bog-approved-09-27-19.pdf (last visited April 7, 2025); State Bar of Arizona, Financial Statements, https://www.azbar.org/about-us/financial-statements (last visited April 7, 2025); State Bar of Arizona, 2023 Annual Report, https://www.azbar.org/about-us/annual-report/ (last visited April 7, 2025).

Petitioners also highlight various activities—such as diversity initiatives, CLE programs, and public engagement efforts—that they view as ideological. Petition at 6-7. But courts have consistently held that such initiatives do not fall outside the *Keller* framework merely because they touch on topics of public interest or professional development. In *Schell*, for example, the Tenth Circuit found that four bar publications discussing topics like the role of attorneys in the state legislature were germane to the improvement of legal services and attorney competence. 11 F.4th at 1193. As long as attorneys can seek refunds for non-germane expenditures, these activities remain within constitutional bounds.

In short, Arizona's integrated bar model is not an outlier—it reflects the prevailing legal approach endorsed by multiple courts to consider this issue post-*Janus*. The claim that the Arizona Bar "ignores *Janus*" is both overstated and legally unsupported.

III. Eliminating the Arizona Bar would harm the legal profession and the public.

The proposed restructuring would significantly disrupt Arizona's established system, impose unnecessary administrative burdens, and deprive the public and the legal community of essential services.

A. The Petition's proposed changes would disrupt regulation, increase costs, and decrease institutional expertise.

The Arizona Bar performs several important functions that go well beyond the bare minimum of attorney regulation and serve the broader interests of the legal system. For example, under A.R.S. § 12-110(A), the bar acts as a formal advisory body to the Court and is regularly called upon to provide input on rulemaking. Through its standing committees—such as civil, criminal, family law practice and procedure—the bar coordinates practitioner-driven proposals and updates to court rules. State Bar of Arizona, Committees, https://www.azbar.org/for-legal-professionals/communities/committees/ (last visited April 7, 2025). It also oversees the Jury Instructions Committees, which play an important role in keeping Arizona's civil and criminal jury instructions accurate and current. *Id*. Even Petitioners acknowledge that the Arizona Bar currently performs substantial regulatory duties, including managing investigations, diversion agreements, and formal disciplinary proceedings. *See* Petition at 17.

Petitioners argue that the Supreme Court could absorb these duties with only modest structural adjustments. *Id*. at 17-18. But fragmenting these responsibilities and transferring them to newly formed administrative units within the AOC would introduce unnecessary duplication, regulatory inconsistency, and delays. Petitioners suggest reallocating the Arizona Bar's $15 million budget to support the transition (*id*. at 15) but provide no concrete plan to ensure those funds would be used efficiently or that service levels would be maintained, let alone improved.

Moreover, the Petition fails to account for the institutional knowledge and specialized expertise held by the Arizona Bar's current staff. Eliminating the Arizona Bar would require not just reassignment of functions, but a complete rebuilding of personnel, processes, and institutional capacity—at great cost and with no guarantee of comparable quality.

B. Integrated bar disbandment jeopardizes essential services for the public and legal community.

Beyond its regulatory functions, the Arizona Bar provides a wide array of public-facing services that directly support both the legal profession and Arizona residents. These include hotlines, pro bono coordination with legal aid organizations, the Fee Arbitration Program for resolving attorney-client disputes without litigation, the Law Office Management Assistance Program (LOMAP) to assist lawyers with practice management, and a robust Client Protection Fund that reimburses clients harmed by attorney misconduct. *See* State Bar of Arizona, Ethics Hotline, https://www.azbar.org/for-legal-professionals/ethics/ethics-hotline/ (last visited April 7, 2025); Pro Bono Arizona, Arizona Bar Foundation and State Bar of Arizona Volunteer Programs, https://probono.azbf.org/for-attorneys/bar-association (last visited April 7, 2025); State Bar of Arizona, Client Protection Fund, https://www.azbar.org/for-the-public/client-protection-fund/ (last visited April 7, 2025); State Bar of Arizona, Fee Arbitration Program, https://www.azbar.org/for-the-public/fee-arbitration/ (last visited April 7, 2025); State Bar of Arizona, LOMAP, https://www.azbar.org/for-legal-professionals/lawyer-regulation/compliance-with-probation-diversion/ (last visited April 7, 2025).

The Bar also administers mentorship initiatives, provides guidance on legal ethics, and regularly engages in public education and outreach efforts. *See* State Bar of Arizona, 2023 Annual Report, https://www.azbar.org/about-us/annual-report/ (last visited April 7, 2025) (highlighting the ethics hotline and pro bono partnerships, among other things). These programs serve a dual purpose: they support attorneys in maintaining ethical, competent practices and ensure that the public has access to legal assistance and professional accountability mechanisms. Their impact extends to underserved communities that rely on pro bono legal services coordinated or promoted by the Arizona Bar, as well as to clients seeking resolution of fee disputes or restitution for attorney misconduct.

Petitioners contend that a voluntary bar could continue offering these services. *See* Petition at 20. However, they provide no realistic plan for sustaining these programs, nor any financial analysis to show how a voluntary bar—dependent on optional dues—would have the capacity or incentive to maintain them at current levels. The continued success of these programs in Arizona depends on stable funding, organizational infrastructure, and integration with the Arizona Bar's regulatory and educational functions—all of which would be disrupted, if not dismantled, under the proposed rule change.

Conclusion

For these reasons, the Office opposes the Petition.

Respectfully submitted on April 28, 2025.

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